BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

THURMA J. JONES	)	
Claimant	)	
VS.	)	
	)	Docket No. 162,828
CONTINENTAL CAN COMPANY	)	
Respondent	)	
AND	)	
	)	
AETNA LIFE & CASUALTY COMPANY	)	
Insurance Carrier	)	
AND	)	
	)	
KANSAS WORKERS COMPENSATION FUND	)	

ORDER

The Kansas Workers Compensation Fund appeals from an Award of Administrative Law Judge Robert H. Foerschler, dated February 17, 1995. The Appeals Board heard oral argument in Kansas City, Kansas.

APPEARANCES

The respondent and its insurance carrier appeared by and through their attorney, Clifford K. Stubbs of Lenexa, Kansas. The Kansas Workers Compensation Fund appeared by and through its attorney, Fred J. Logan, Jr. of Prairie Village, Kansas. The Claimant appeared not, as she had previously settled her claim with the respondent.

RECORD AND STIPULATIONS

The Appeals Board has considered the record and adopted the stipulations listed in the February 17, 1995 Award.

ISSUES

Kansas Workers Compensation Fund (Fund) requests Appeals Board review of the following issues in reference to the liability of the Fund:

(1) Whether the Administrative Law Judge erred in not dismissing the Fund from these proceedings when it was impleaded only minutes prior to the regular hearing; and
(2) The extent, if any, of the liability of the Kansas Workers Compensation Fund.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the evidentiary record and hearing arguments of the parties, the Appeals Board finds as follows:

(1) The regular hearing was held in this matter on April 5, 1994 at 3:00 p.m. before Administrative Law Judge Robert H. Foerschler. At 2:09 p.m. on the day of the regular hearing, fifty-one (51) minutes before the hearing started, the respondent's insurance carrier, through its attorney, filed by facsimile with the Commissioner of Insurance for the State of Kansas a notice impleading the Commissioner in his capacity as an administrator of the Kansas Workers Compensation Fund in this case pursuant to K.S.A. 1991 Supp. 44-567(d). The Administrative Law Judge conducted the regular hearing with the claimant testifying and represented by counsel. The respondent and its insurance carrier also were represented by counsel. The Fund was not present nor represented by counsel at the regular hearing.

Subsequent to the regular hearing, the claimant settled her case with the respondent before a Special Administrative Law Judge on July 8, 1994. At that settlement hearing, the Fund stipulated to the reasonableness of the settlement and all other issues between the Fund and the respondent remained open for future determination.

One of the statutory requirements to shift liability from the employer to the Fund is a requirement that the employer serve written notice of the employee's claim on the Commissioner of Insurance prior to the first full hearing where any evidence is presented on the claim. See K.S.A. 1991 Supp. 44-567(d). The first full hearing in a workers compensation case is before an examiner at which pre-trial stipulations are taken or testimony is presented. Safeway Stores, Inc. v. Workers' Compensation Fund, 3 Kan. App. 2d 283, 593 P.2d l009 (1979). The Fund contends that the notice of impleading, in this case, which was faxed to the Commissioner of Insurance on the date of the regular hearing, must be presumed to be invalid because it precluded the Fund from appearing and participating in the regular hearing. Additionally, the Fund argues that there is no statutory authority for serving the Commissioner of Insurance by merely faxing a notice of impleading. On the other hand, respondent argues that the statute is unambiguous and only requires that the written notice of impleading be served on the Commissioner of Insurance at any time prior to the first full hearing. K.S.A. 1991 Supp. 44-567(d). Respondent contends that if the legislature intended for a specific time limit for service prior to the first full hearing, it would have included this requirement in the statute. In regard to the Fund's argument that written notice cannot be faxed, respondent points out that the statute does not specify the method that has to be used to serve the Insurance Commissioner with notice. The statute only requires that the notice be given prior to the first full hearing and the method of service is not specified. K.S.A. 1991 Supp. 44-567(d). Accordingly, respondent argues service by facsimile is sufficient and satisfies the statute.

The Appeals Board agrees with the respondent's argument that K.S.A. 1991 Supp. 44-567(d) is unambiguous and the employer satisfies the statute as long as the notice of impleader is received by the Insurance Commissioner prior to the start of the first full hearing. The Appeals Board also agrees that since the statute does not specify the method to serve the notice of impleader, then service by facsimile is sufficient. However, the Appeals Board recognizes that the respondent had been a party in this case since the Application for Hearing was filed on February 12, 1992. The Appeals Board is of the

opinion that the respondent did know or should have known, months prior to the date of full hearing, that Fund liability was an issue and it was necessary to implead the Fund and neglected to do so.

The Fund next raises the issue of whether a notice of impleader that is received by the Commissioner of Insurance, as in this case, minutes prior to the full hearing, gives the Fund a reasonable opportunity to be heard and to present evidence as required by K.S.A. 1991 Supp. 44-523(a). The Appeals Board finds that the Fund did not have a reasonable opportunity to be heard and present evidence because it did not receive the notice of impleader until a few minutes before the regular hearing was to commence. Additionally, the notice of impleader that was filed did not give the time and the place of the regular hearing. Even if the impleader would have given such information, the Appeals Board finds that such notice would have been defective and insufficient. Accordingly, the Appeals Board finds that the evidence in the regular hearing in this matter, held on April 5, 1994, as it relates to the issues between respondent and the Fund, is inadmissable.

(2) In regard to the Fund liability issue, the Appeals Board affirms the Administrative Law Judge's finding that the Fund is liable for one hundred percent (100%) of all the costs and workers compensation benefits paid in this case. The evidentiary deposition of Lynn D. Ketchum, M.D., was taken at the request of the respondent on November 17, 1994 after the Fund was impleaded. Dr. Ketchum was appointed by the Administrative Law Judge to perform an independent medical examination evaluation of the claimant. Dr. Ketchum's deposition was taken only to present evidence in reference to Fund liability issues. The Fund contends that Dr. Ketchum's testimony established Fund liability for only fifty percent (50%) of the claimant's workers compensation benefits as Dr. Ketchum testified that claimant's pre-existing left shoulder injury contributed to fifty percent (50%) of claimant's present wrist and hand impairment. See K.S.A. 1991 Supp. 44-567(a)(2). On the other hand, the respondent argues that the assessment of one hundred percent (100%) liability to the Fund is correct as Dr. Ketchum's testimony established that but for the claimant's pre-existing left shoulder injury, she would not have sustained her present left hand and wrist injury. See K.S.A. 1991 Supp. 44-567(a)(1).

Dr. Ketchum opined that fifty percent (50%) of the claimant's present upper extremity impairment of eighteen percent (18%) was due to her previous left shoulder and neck injury. However, Dr. Ketchum further testified that claimant's present left upper extremity impairment would not have occurred but for the pre-existing impairment. It is the finding and conclusion of the Appeals Board that Dr. Ketchum's "but for" opinion satisfies the requirements of K.S.A. 1991 Supp. 44-567(a)(1) and shifts liability from the respondent to the Fund. Grizzle v. Gott Corp., 19 Kan. App. 2d 392, 872 P.2d, 303 (1993). Had Dr. Ketchum opined that claimant's pre-existing impairment only contributed to claimant's present disability, then this case would have been a contribution case and not a “but for” case, as argued by the Fund. See K.S.A. 1991 Supp. 44-567(a)(2).

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Robert H. Foerschler, dated February 17, 1995, should be, and is hereby, affirmed in all respects.

All other findings of Administrative Law Judge Robert H. Foerschler in his Award dated February 17, 1995, are incorporated herein and made a part hereof, as specifically set forth in this Order to the extent they are not inconsistent with the findings and conclusions expressed in the Award.

IT IS SO ORDERED.

Dated this ____ day of September, 1995.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Gary L. Jordan, Ottawa, Kansas
Clifford K. Stubbs, Lenexa, Kansas
Fred J. Logan, Prairie Village, Kansas
Kate F. Baird, Prairie Village, Kansas
Robert H. Foerschler, Administrative Law Judge
Philip S. Harness, Director